Supreme Court, U.S.
FILED
JAN 20 2015
OFFICE OF THE CLERK

No. 14-103

In The
Supreme Court of the United States

BAKER BOTTS L.L.P. AND JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,
Petitioners,

v.

ASARCO LLC,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Petitioners served as Chapter 11 debtor's counsel under § 327(a) of the Bankruptcy Code ("Code"), which permits bankruptcy trustees or debtors-in-possession to employ attorneys, accountants, and other professionals "that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee [or debtor-in-possession] in carrying out the trustee's [or debtor-in-possession's] duties under this title." 11 U.S.C. §§ 327(a), 1107(a). Section 330(a) governs compensation for § 327(a) professionals, authorizing bankruptcy courts to award from estate funds "reasonable compensation for actual, necessary services rendered by" the professionals. *Id.* § 330(a)(1).

After petitioners filed fee applications seeking compensation under § 330(a) for their bankruptcy work, litigation ensued between petitioners and ASARCO, the reorganized debtor, over the fee requests. Petitioners sought an award of over $8 million for fees incurred in the adverse fee litigation, on top of the $124 million they were paid for their bankruptcy work at standard hourly rates (plus enhancements). The longstanding American Rule provides that parties to litigation must generally bear their own fees absent express congressional authorization to shift fees to the losing party.

The question presented is whether § 330(a) of the Code expressly authorizes bankruptcy professionals to recover fees incurred in adverse fee litigation against the bankruptcy estate.

RULE 29.6 STATEMENT

Respondent ASARCO LLC is wholly owned, directly or indirectly, by Americas Mining Corporation, which in turn is wholly owned by Grupo Mexico, which is publicly traded in Mexico.

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INTRODUCTION

This case presents a clear choice between enforcing the statutory text as written—as the Fifth Circuit did—or embracing a judicially-created fee-shifting regime based on policy concerns. The question is whether § 330(a)[1] of the Code expressly authorizes bankruptcy professionals to recover attorneys' fees incurred while litigating fee disputes—i.e., "fees-on-fees"—against the estate. That is, in addition to their fees for the underlying bankruptcy work (paid at standard hourly rates), petitioners seek another layer of fees for litigation *adverse to the estate*.

Absolutely nothing in § 330(a) authorizes that counterintuitive result. Section 330(a), together with §§ 327 and 328, creates a compensation scheme for many different professionals, not just attorneys, to be paid for authorized work. Section 327(a) authorizes a trustee or debtor-in-possession to employ a wide variety of professionals to assist the trustee or debtor-in-possession, as long as they are free from interests adverse to the estate. Section 330(a)(1) then authorizes "reasonable compensation for...necessary services rendered by" professionals hired under § 327(a). Thus, the statutes clearly provide reasonable compensation for services that assist the work of the trustee or debtor-in-possession.

But when a dispute arises over the reasonableness of the professional's fees, nothing in the text authorizes shifting the professional's attorneys' fees in the event the professional prevails in litigation adverse to the estate. The relevant statutory provi-

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[1] Statutory references and citations are to the current version of Title 11 of the U.S. Code, unless indicated otherwise.

sions that authorize compensation for non-adverse work that serves the estate hardly allow compensation for work that is adverse to the estate and benefits only the professional, at the *direct expense* of the estate. That result is perfectly clear from the text of the statute read in isolation; there is a world of difference between compensation for services provided to the trustee and attorneys' fees for litigation adverse to the estate. But this conclusion is buttressed by the American Rule, which generally requires parties in adverse litigation to bear their own litigation costs in the absence of express congressional authorization. As the Fifth Circuit correctly concluded, nothing in the text of § 330(a) authorizes such fee-shifting for an attorney engaged in litigation adverse to the estate.

Petitioners purport to ground their position in text, but it is a façade. They note that § 330(a)(1) authorizes "reasonable compensation," but almost always omit the critical textual qualifier "reasonable compensation *for...necessary services rendered by*" a professional. The United States ("Government") correctly recognizes that petitioners' textual arguments reflect an untenable interpretation of § 330(a)(1).

Petitioners' disregard for text also leads them to borrow from prevailing-party, fee-shifting statutes. But those statutes demonstrate what a fee-shifting statute that overcomes the American Rule looks like, and § 330(a)(1) looks nothing like those statutes. Fee-shifting statutes focus on attorneys' fees (not compensation for a wide variety of professionals) and use the language of "prevailing party" (not assisting the trustee or the estate). Section 330(a) uses materially distinct language in prescribing a different fee regime that is based on a different underlying ra-

tionale. Petitioners' improper reliance on prevailing-party statutes, and their failure to respect statutory text, are on full display in their assumption that their argument would allow fees-on-fees only for "successful" applicants. As the Government recognizes, petitioners' textual argument would logically permit fee-shifting even for *unsuccessful* fee applicants, which is absurd. The justification for fees in the bankruptcy context is assisting the trustee, not succeeding (let alone failing) in adverse litigation.

At bottom, petitioners' position is based on little more than policy concerns about "dilution" of fee awards and "parity" between bankruptcy and non-bankruptcy lawyers. The Government now takes this position as well, candidly arguing that policy concerns about "dilution" justify a "judicial exception" from the American Rule and the clear text of § 330(a)(1). But even if policy concerns could trump the statutory text and the default presumption of the American Rule, it is the Fifth Circuit's rule—not petitioners'—that *ensures* actual parity. If non-bankruptcy lawyers or accountants end up in adverse litigation with their client over fees, they do not then get to send the client a bill for fees incurred in the fee dispute. Petitioners are not seeking true parity, but a rule that would make bankruptcy lawyers the envy of the legal profession. In addition to compensation at hourly rates for services rendered, plus costs incurred in preparing fee applications, bankruptcy lawyers' fees would continue to accumulate even while litigating against their client over the amount of the fees. To the extent "parity" is relevant at all, it supports the decision below.

This case illustrates well why it would be a mistake to allow fees-on-fees under § 330(a). After re-

ceiving over $120 million for their bankruptcy work (at full hourly rates), plus another $4 million in enhancements, petitioners asked for *$8 million more* for time spent litigating their fees and pursuing enhancements. They deployed nearly 200 timekeepers to work on this, which included a $400,000 "self-audit" of their time entries and a $750,000 review of the client's file. Under these circumstances, it strains credulity for petitioners to suggest that their fees have been "diluted" or that fee-shifting is needed to ensure that lawyers will continue to take bankruptcy cases. This Court should affirm the Fifth Circuit's ruling that nothing in § 330(a) authorizes the windfall sought by petitioners.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Bankruptcy Code, 11 U.S.C. §§ 327(a), 328(a), 328(c), & 330(a), are set forth in the Appendix to this brief at 1a-4a.

STATEMENT OF THE CASE

A. Statutory Background

The Bankruptcy Code empowers trustees, with bankruptcy court approval, to "employ...attorneys, accountants,...or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title." § 327(a). Chapter 11 debtors-in-possession possess the same power.[2] § 1107(a).

Section 330(a) establishes a framework for compensating professionals employed under § 327(a).

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[2] For simplicity, this brief refers only to trustees, though the same rules apply for debtors-in-possession.

This provision applies to all authorized professionals performing services for a trustee, not just attorneys. Section 330(a)(1)(A) states that courts "may award" "reasonable compensation for actual, necessary services rendered by" professionals. It then lists factors courts must consider in "determining the amount of reasonable compensation." § 330(a)(3). It provides that courts "shall not allow compensation for" "unnecessary duplication of services" or "services that were not—" "reasonably likely to benefit the debtor's estate" or "necessary to the administration of the case." § 330(a)(4). It also states: "Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application." § 330(a)(6).

Section 328 also affects professional compensation. First, § 328(c) reinforces § 327(a)'s requirement of non-adversity by stating a "court may deny allowance of compensation for services...of a professional person employed under section 327...if, at any time during such professional person's employment under section 327..., such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed." Second, § 328(a) allows trustees (with court approval) to employ § 327 professionals on predetermined fee arrangements as an alternative to § 330(a)'s compensation scheme.

The professional compensation that §§ 327, 328, and 330(a) authorize, unlike the attorneys' fees that fee-shifting statutes award, is ordinarily not paid by a party that has lost contested litigation. Instead, it is an administrative expense the bankruptcy estate pays before paying unsecured creditors. §§ 503(b),

507(a). Because estates are usually unable to pay all creditors, "every dollar paid for administrative expenses including professional fees detracts from the unsecured creditors' recovery." Pet.App.16a-17a.

B. Factual Background

1. ASARCO is a copper mining, smelting, and refining company. Pet.App.2a. In 2005, ASARCO suffered from historically low copper prices. *In re ASARCO LLC*, 420 B.R. 314, 355-56 (S.D. Tex. 2009). Faced with low prices, a striking workforce, and major environmental and asbestos liabilities (among other factors), ASARCO sought bankruptcy protection. *Ibid.* Petitioners were retained as debtor's counsel under § 327(a). C.A.Rec.1016-18.

Reorganized ASARCO emerged from bankruptcy in December 2009. Pet.App.83a. While petitioners claim credit for single-handedly engineering a "rags-to-riches" turnaround, Pet.Br.8-9, 49, they cannot claim responsibility for a key factor in the reversal of fortune: a substantial rise in copper prices that allowed ASARCO to generate over $1 billion in cash during the bankruptcy. *ASARCO*, 420 B.R. at 319, 346, 355; see Pet.App.134a.

2. Following consummation of the parent company's plan, petitioners filed final fee applications seeking, *inter alia*, (i) over $120 million in fees (at full hourly rates) for work done as debtor's counsel, (ii) more than $24 million in fee enhancements, and (iii) over $8 million in fees for litigating their fee applications and fee enhancements. Pet.App.56a; C.A.Rec.7051.

Petitioners suggest that they provided "excruciating detail" in their applications, Pet.Br.27-28, but the record shows otherwise. For example, Baker

Botts' applications had time entries with nothing more than "conference call," "work on strategy," "work on various legal issues," or "work regarding plan issues." C.A.Rec.34944, 34953-74, 35000-06, 35649-56. Sometimes, such vague descriptions were given for days of time. ASARCO objected to vague descriptions that violated local rules. C.A.Rec.6062-64; see 3 Collier on Bankruptcy ¶ 330.03[6] (16th ed. 2014) ("Collier") ("Most courts find entries such as 'telephone call' or 'meeting' unacceptable...."). ASARCO also objected to entries pervasively lumped or block-billed, in violation of local rules, and fees for non-compensable clerical or administrative tasks. C.A.Rec.6058-68, 34857-88, 35147-240, 35423-60; see 3 Collier ¶ 330.03[6] ("[C]ourts do not fully compensate professionals who lump a number of activities into a single entry."). See also Br.Opp.11 (citing cases sustaining similar objections).[3]

The bankruptcy court scheduled deadlines to adjudicate the dispute. Baker Botts then conducted a "self-audit" to correct its invoices—even though the invoices should have been prepared correctly the first time. Contrary to its claim that its original time entries were proper, Baker Botts generated a "1160-page supplement," Pet.8; C.A.Rec.34614-5774, then sought over $400,000 in fees for making those corrections. Pet.App.49a-50a; C.A.Rec.6897.

Petitioners also racked up more fees during the litigation. For example, when ASARCO requested part of its client file, Baker Botts—without notifying

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[3] ASARCO also objected to the requested fee enhancements, noting that petitioners had been adequately compensated at their standard hourly rates which had *increased* throughout the bankruptcy. Sealed.C.A.Rec.592-93, 598.

ASARCO of any allegedly unreasonable burdens associated with complying—spent 2,440 hours purportedly to ensure privileged materials of *other* clients were not in ASARCO's file. Pet.8-9. That alone added $750,000 to Baker Botts' fees-on-fees request. C.A.Rec.6897.

In the end, petitioners claimed to incur over $8 million in litigation fees for a five-month pursuit of fee enhancements and base fees—including billing from 191 Baker Botts timekeepers (150 attorneys). C.A.Rec.6893-900; Pet.App.27a-28a. ASARCO objected, arguing § 330(a) does not allow such fees and that the request was excessive. C.A.Rec.6883-902. Contrary to petitioners' assertions that ASARCO's objections "required little effort" and had no "downside risk," Pet.Br.51-52, ASARCO incurred almost $2 million in fees in the litigation, C.A.Rec.6941-44.

C. Procedural History

1. In approving petitioners' $120 million base-fee requests in full, the bankruptcy court adopted petitioners' proposed findings wholesale. Pet.App.55a-146a.[4] While the court denied ASARCO's objections, there was no contention or finding that the objections were made in bad faith. Pet.App.21a. The court also awarded $4.1 million in fee enhancements. Pet.App.133a-135a. Further, while the court found the requested collateral fees were "higher than were reasonable or necessary," it awarded $5 million for seeking *both* base fees and enhancements. Pet.App.140a-142a. Citing policy concerns such as

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[4] The lower courts issued separate, but not materially different, opinions for each petitioner; this brief will refer to the opinions addressing Baker Botts. See US.Br.8 n.4.

dilution, the court concluded that § 330(a)(6) allows such collateral fees. Pet.App.136a-141a.

The district court adopted the bankruptcy court's reasoning in allowing fee-litigation fees, yet held petitioners could not recover fees for seeking enhancements and remanded for determination of which fees were related to litigating base fees and which were incurred for enhancements. Pet.App.45a-49a, 54a. On remand, the bankruptcy court somehow concluded that the *entire* $5 million related solely to litigating the base fees, and not a penny was incurred in pursuing enhancements.[5] Pet.App.147a-151a.

2. The Fifth Circuit reversed on fees-on-fees, holding that § 330(a) "does not authorize compensation for the costs counsel or professionals bear to defend their fee applications." Pet.App.14a. Whereas the Ninth Circuit had held that § 330(a) allows fees-on-fees to avoid dilution of fee awards—even though the statute is "silent" about fees-on-fees, *In re Smith*, 317 F.3d 918, 928-29 (9th Cir. 2002)—the Fifth Circuit rejected that course. Pet.App.15a-17a. Finding an "absence of explicit statutory guidance" for fees-on-fees, it applied the "American Rule that each party to litigation bears its own costs." Pet.App.17a. The court concluded, *inter alia*, that fees incurred litigating a fee request are not compensable under § 330(a)(4) because they are neither beneficial to the estate nor necessary to case administration; such

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[5] Given the discretion afforded to bankruptcy courts, ASARCO elected not to appeal the base-fee ruling or the fees-on-fees amount. Petitioners contend this is an acknowledgement the objections were "baseless," Pet.Br.5, 52, but deciding not to challenge a ruling under an abuse-of-discretion standard in no way admits the position was without justification.

work benefits the professional, and the estate would bear the cost. Pet.App.14a-16a.

The court found § 330(a) materially different from fee-shifting statutes in the civil-rights context, noting that "Congress designed fee shifting provisions in express derogation of the American Rule," with the intent that "the losing party should bear the full costs of counsel for the winner." Pet.App.17a. No such "explicit statutory guidance" exists in § 330(a), and "the equities are quite different" in bankruptcy. Pet.App.17a-18a. The court also rejected the "comparability" argument. Pet.App.18a-19a. It credited the opinion of an "astute bankruptcy court" that comparability supports the *denial* of fees in this context because, under the American Rule, non-bankruptcy lawyers cannot recover fees incurred in fee litigation with a client. Pet.App.19a.

In sum, although § 330(a) unquestionably authorizes compensation for professional services rendered to the estate, it "is not fairly read to include 'fees for defense of fees' either as reasonable, necessary costs of case administration or to prevent dilution of...core fees." Pet.App.20a. The Fifth Circuit emphasized that its "opinion should not be read as encouraging tactical or ill-supported objections to fee applications"—none of which was alleged here—and explained that courts have ample means to avoid bad-faith objections to fees. Pet.App.20a-21a.

SUMMARY OF ARGUMENT

The Fifth Circuit correctly held that § 330(a)'s straightforward text does not authorize fees for fee litigation. There is no doubt that the fees petitioners seek were incurred in adversarial litigation. And there is no question the American Rule provides a

default rule that such litigation fees are not recoverable absent express congressional authorization.

In §§ 330(a)(1) and 327(a), Congress enacted a limited authorization of fees for a wide variety of professionals for their work performed for a trustee. Such professionals may receive "reasonable compensation for...necessary services rendered by" them to assist the trustee with its duties. As the Government correctly recognizes, "services rendered" includes only the professionals' work performed *for others in the bankruptcy*, not collateral litigation that is *adverse* to the estate and performed solely for the professionals' own benefit. That rather obvious inference is further reinforced by §§ 327(a) and 328(c), which emphasize that professionals can be retained and compensated only for pursuing matters not adverse to the estate. Unlike fee-shifting statutes, these Code provisions are not specific to adversarial litigation or prevailing parties, and they do not remotely reverse the American Rule.

Section 330(a)(4) also bars self-interested fees-on-fees work because such work is neither beneficial to the estate—it *diminishes* the estate—nor necessary to the case. Moreover, the fact that § 330(a)(6) expressly references *preparation* of fee applications as compensable (at a lower rate), yet § 330(a) says nothing anywhere about compensation for fee disputes, underscores that Congress did not intend to depart from the American Rule for fees-on-fees. Fee applications—whether by lawyers or other professionals like accountants or appraisers—are a necessary component of providing services to the trustee. But the same cannot be said for adversarial litigation over fees, which unquestionably triggers the American Rule. The difference is starkly illustrated

in the context of non-lawyer professionals such as accountants. There is an obvious distinction between compensating an accountant for both her underlying accounting services and a fee application covering those services, versus compensating the accountant's lawyers for successfully litigating an objection to those fees. The latter situation, like petitioners' adverse litigation of a fee dispute, squarely implicates the American Rule.

To attack the Fifth Circuit's holding, petitioners and the Government try different theories, with the Government readily acknowledging that petitioners' statutory arguments are wrong. Ultimately, though, petitioners and the Government end up in the same place: needing a policy-based exception to the American Rule that reads a prevailing-party concept into § 330(a). But petitioners' theory largely ignores the key text in § 330(a)(1) and would logically lead to awarding fees-on-fees even where the fee applicant is *unsuccessful*. And the Government candidly requests a "judicial exception" to the American Rule based on policy concerns about fee "dilution"—the very same dilution concern that the Government rejected below as "without merit."

Both petitioners and the Government attempt to shoehorn their policy arguments into § 330(a)(3), which outlines factors a court should consider "in determining the amount of reasonable compensation to be awarded" to a bankruptcy professional. But § 330(a)(3), by its plain terms, addresses only the *amount* of compensation for authorized services. It says nothing about what *types* of services are compensable. That question is addressed by § 330(a)(1) (and §§ 327 and 328), which does not authorize the fee-shifting that petitioners seek.

Furthermore, in a plain acknowledgement that there is no sound policy argument for awarding fees-on-fees for *unsuccessful* fee applicants, both petitioners and the Government attempt to convert § 330(a) into a prevailing-party statute. But § 330(a) will not bear such a construction. Unlike statutes that expressly overturn the American Rule for lawyers who prevail in certain types of adverse litigation, §§ 327(a) and 330(a) create a regime that covers *all* professionals and aims to compensate them for services rendered in assisting the trustee. Reading a prevailing-party requirement into § 330(a) would ignore the unique nature of bankruptcy proceedings and produce anomalous results.

In all events, petitioners' and the Government's policy arguments about "dilution" and "parity" are wholly without merit. "Parity" between bankruptcy and non-bankruptcy professionals is achieved by *precluding* fee-litigation fees because that is the default rule outside bankruptcy. A non-bankruptcy lawyer or accountant who ends up in litigation with a client over fees does not then get to send the client a bill for the cost of that litigation. Likewise as to "dilution," non-bankruptcy lawyers often face *greater* risks of non-payment and clients disputing bills.

And petitioners' suggestion that the Fifth Circuit's rule will deter lawyers from pursuing bankruptcy work blinks reality. Petitioners were paid $120 million for their work (at rates in excess of what they often receive outside bankruptcy), and they were paid on time as the case proceeded. They were also paid for preparing the fee application, something that few non-bankruptcy lawyers enjoy. Needless to say, it is unlikely that Baker Botts or any other law firm will exit the bankruptcy business

if denied fees-on-fees. And finally, as with other areas of the law, adequate safeguards exist to prevent *undue* dilution of fee awards caused by bad-faith objections or other litigation misconduct. The American Rule has its critics, but it has stood the test of time and reflects our system's default rule for properly allocating responsibility for litigation costs. By honoring the American Rule, the Fifth Circuit adhered to the text of § 330(a)(1) and provided all parties with the proper incentives going forward.

ARGUMENT

I. Section 330(a) Of The Bankruptcy Code Does Not Authorize Fees For Fee Litigation.

"The starting point in discerning congressional intent is the existing statutory text." *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 534 (2004). The Court looks "to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997). That should also be the "end" here, *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1755 (2014), as the Code provides a framework for compensating *all* bankruptcy professionals for providing services to the estate that cannot be read to authorize attorneys' fees for litigating fee disputes against the estate.

Sections 327(a) and 330(a)(1) work together to authorize "reasonable compensation for...necessary services rendered by" various types of professionals hired to assist the trustee. The key terms in these provisions make clear that compensation is permitted only for professionals' services performed *for others*, and only for assisting the trustee with its duties. *Nothing* in these provisions authorizes fees for attor-

neys' self-interested work litigating their fees adverse to the estate. Such fee litigation also squarely implicates the American Rule, which directs that litigants bear their own fees absent an express statutory authorization that is plainly lacking here.

A. The Code's text does not expressly authorize fees for fee litigation.

1. Section 330(a) creates a limited compensation scheme that does not include adverse litigation over fees.

a. Section 327(a) authorizes the appointment of a wide variety of professionals to "represent or assist the trustee in carrying out *the trustee's duties* under" the Code. § 327(a) (emphasis added). It makes clear that those professionals may not hold an "interest adverse to the estate," a prohibition reinforced by § 328(c)'s statement that compensation may be disallowed if a professional develops an "interest adverse" to the estate. Section 330(a)(1), in turn, authorizes "reasonable compensation for...necessary services rendered by" a professional employed under § 327(a).

Sections 327(a) and 330(a)(1) must be read together in analyzing what compensation is authorized for § 327(a) professionals. Section 330(a)(1) expressly references § 327(a) and makes clear § 327(a) professionals get paid for their work *under § 327(a)*. This Court has observed that these provisions should be "taken together," in holding attorneys can receive compensation under § 330(a) only if employed under § 327(a). *Lamie*, 540 U.S. at 534, 537. Similarly, the scope of a professional's employment under § 327(a) is key to understanding what services are compensable under § 330(a)(1). *E.g.*, *Branch* v. *Smith*, 538 U.S. 254, 281 (2003); cf. *Beecham* v. *United States*,

511 U.S. 368, 372 (1994) ("The plain meaning that we seek to discern is the plain meaning of the whole statute, not of isolated sentences.").

Especially when read in light of § 327(a), § 330(a)(1) makes clear that Congress's authorization of compensation for bankruptcy professionals does not extend to self-interested fees-on-fees work. Several aspects of § 330(a)(1) underscore that this provision covers only work performed *for others*.

First, as the Government correctly recognizes, US.Br.31-34, the word "services" in § 330(a)(1) plainly refers to work performed for others. See Webster's New International Dictionary 2288 (2d ed. 1934) ("labor performed for another" or "conduct contributing to the advantage of another or others"); Oxford English Dictionary 517 (1st ed. 1933) ("action of serving, helping, or benefiting; conduct tending to the welfare or advantage of another"); see also Black's Law Dictionary 1607 (3d ed. 1933) ("duty or labor to be rendered by one person to another").[6] The word "rendered" in § 330(a)(1) also signifies work performed for others because to "render" means to "contribute; as to *render* assistance to one." 1934 Webster's 2109.

A straightforward reading of the statutory text thus shows that § 330(a)(1) authorizes compensation

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[6] The words "reasonable compensation for...services rendered" were introduced in the 1934 amendments to the Bankruptcy Act of 1898. See Act of June 7, 1934, ch. 424, sec. 77B(c)(8), 48 Stat. 911, 917 (1934); see also Chandler Act, ch. 575, ch. X, art. XII, secs. 241-45, 52 Stat. 840, 900-01 (1938). "[N]ecessary" was added in 1978. See Act to Establish a Uniform Law on the Subject of Bankruptcies, Pub. L. No. 95-598, tit. II, ch. I, sec. 330, 92 Stat. 2549 (1978) ("1978 Act").

only for professionals' work *done for others*. See, *e.g.*, *Woods* v. *City Nat'l Bank & Trust Co.*, 312 U.S. 262, 268 (1941) (phrase "'reasonable compensation for services rendered' necessarily implies loyal and disinterested service in the interest of" a client).

b. When bankruptcy attorneys perform purely self-interested work, they cannot be said to be rendering services for others. Specifically in the fees-on-fees context, it is illogical to say attorneys who have shifted to adversarial litigation *representing themselves against the bankruptcy estate* are performing work "for another," never mind "disinterested service" that is not "adverse to the estate." "It is simply not in accord with English usage to give [this text] a meaning that covers" such self-interested work. *Whitfield* v. *United States*, 2015 WL 144680, at *3 (U.S. 2015). Section 330(a)(1) clearly authorizes compensation only for "services rendered" for others in the underlying bankruptcy case. See US.Br.31-34.

Additionally, § 330(a)(1)'s "reasonable compensation for...services rendered by" § 327(a) professionals can only be for work done *under § 327(a)*. Cf. *Lamie*, 540 U.S. at 534, 537-38. When an attorney is engaged in self-interested work to defend his fees, he is not "represent[ing] or assist[ing] the trustee in carrying out the trustee's duties." To the contrary, he is litigating *adverse to the estate that the trustee serves*.

That plain-text reading of the statute is buttressed by the fact that §§ 327(a) and 330(a)(1) apply to both attorneys and non-attorney professionals, such as auditors and accountants. For example, if an accountant were hired by a trustee to perform services for the estate but then wound up in fee litigation, the accountant presumably would hire a lawyer to represent her in the litigation. It would be ab-

surd to suggest that the accountant's lawyers were performing compensable services under § 330(a)(1): they were not retained to represent the trustee under § 327(a), and their work would not constitute "services rendered" to the trustee under § 330(a)(1). Those lawyers would be serving only the accountant's interests, which are *directly at odds* with the interests of the bankruptcy estate.

The outcome should be no different just because attorney-professionals can litigate fee fights themselves. The services a law firm "renders" to itself in a fee dispute are performed solely for its own benefit and do not assist the trustee or benefit the estate. Indeed, if Baker Botts had attempted to hire outside counsel to represent it in the fee fight, that counsel could not receive compensation under §§ 327(a) and 330(a)(1) unless independently appointed by the trustee. And it is difficult to imagine how a trustee would practically—or could legally under § 327(a)—approve the engagement of a law firm solely to pursue litigation adverse to the estate. There is no reason for a different result just because Baker Botts' attorneys can shift over into adverse fee litigation without the intervening approval of the trustee. There is no question that, at the point attorneys start litigating a fee dispute for their exclusive benefit, they are no longer providing services to the trustee or acting without an "interest adverse to the estate." §§ 327(a), 328(c).

Finally, Congress's direction in § 330(a)(1) that only "necessary" services are compensable further excludes fees-on-fees work. The word "necessary" must be read in light of "the end sought," Black's Law Dictionary 1181 (4th ed. 1968), which means it must be understood in light of the scope of profes-

sionals' obligations under § 327(a). Cf. *Lamie*, 540 U.S. at 537-38. For a § 327(a) professional, it strains credulity to suggest that adversarial fee litigation—which, if successful, would diminish the value of the estate—is somehow "necessary" to assist the trustee with the performance of its duties. Fees-on-fees work cannot be considered "necessary services rendered" without torturing the words in § 330(a)(1).

2. The American Rule forecloses any argument for "fee-shifting" under § 330(a).

Any doubt about whether § 330(a) authorizes the fee-litigation fees that petitioners seek is removed by the American Rule, under which a "prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247 (1975). The American Rule is a "bedrock principle" "deeply rooted in our history and in congressional policy." *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252-53 (2010); *Alyeska*, 421 U.S. at 271; accord *Fox* v. *Vice*, 131 S. Ct. 2205, 2213 (2011).

A litigant can recover fees only if it invokes an exception to the American Rule, such as a specific statute allowing fee-shifting or a finding of bad-faith litigation conduct. *Alyeska*, 421 U.S. at 257-59. Courts may not create additional exceptions because they lack authority to "invade the legislature's province by redistributing litigation costs." *Id.* at 271; accord *id.* at 260-61, 263, 269-71. Further, ambiguous statutory language does not suffice; fees are not recoverable "absent explicit congressional authorization" evidencing that "Congress intended to set aside this long-standing American rule of law." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814-15 (1994) (internal quotation marks omitted).

As petitioners acknowledge, the American Rule applies in bankruptcy. Pet.Br.40; accord *Alyeska*, 421 U.S. at 260 n.33. And petitioners do not (and cannot) deny that it applies to fee litigation. See, *e.g.*, *In re Frazin*, 413 B.R. 378, 400 (Bankr. N.D. Tex. 2009), aff'd in part, rev'd in part, 732 F.3d 313 (5th Cir. 2013); *In re Brous*, 370 B.R. 563, 572 (S.D.N.Y. 2007). The American Rule reflects a strong default rule that each side bears its own litigation fees, in contradistinction from the "loser pays" rule that some foreign nations employ.

Yet *nothing* in § 330(a)(1) expressly authorizes fees for attorneys engaged in litigation adverse to the estate. Sections 327(a) and 330(a)(1) are not fee-shifting statutes and do not address attorneys' fees distinctly. Instead, they provide compensation for all professionals for services rendered *to assist the trustee*, which includes accountants' reports as well as litigation services that attorneys render on behalf of the trustee. But self-interested fee litigation by attorneys is altogether different, shifting the attorney from hired representative of the trustee to a litigant acting for his own benefit, adverse to the estate. That role fully implicates the American Rule. Petitioners need an express authorization to recover fees from such litigation; nothing in § 330(a) comes close.

Petitioners pretend the American Rule is an on/off switch that is turned off when *any* fee provision exists; that is, they suggest that once Congress authorized *some* fees in § 330(a), the American Rule disappeared entirely. Pet.Br.40-43. But this Court has made clear that, because of the American Rule, deciding if fees are allowed requires parsing the words Congress uses. See *Hardt*, 560 U.S. at 253-54; *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 174

(2009).[7] Congress sometimes broadly authorizes "a reasonable attorney's fee" that covers all fees, see *infra* Part I.C, but here its authorization is not specific to attorneys' fees and clearly "limit[s] the services for which compensation may be sought," US.Br.6—contrary to petitioners' claims that § 330(a) does not specify compensable "services" or "tasks," Pet.Br.7, 33, 43. Under the American Rule, Congress must expressly indicate its intent to allow fee-shifting, and Congress's authorizing terms must be honored. See *In re Crescent City Estates, LLC*, 588 F.3d 822, 825-26 (4th Cir. 2009). The presumption of the American Rule is at least as strong as other presumptions that do not wholly expire when some degree of deviation from the default rule has occurred. See, *e.g.*, *Morrison* v. *Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255, 265 (2010) (presumption against extraterritoriality means statutes must clearly indicate extraterritorial application, *but also* "when a statute provides for some extraterritorial application, the presumption...operates to limit that provision to its terms").[8]

The Government apparently forgot about the American Rule, while seeking a "judicial exception"

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[7] Petitioners rely on *Alyeska*'s citation to a provision of the Bankruptcy Act of 1898 (which § 330(a) has replaced) as an example of an explicit fee authorization. Pet.Br.40. But *Alyeska* made plain "[t]hese statutory allowances...differ considerably among themselves." 421 U.S. at 260-61.

[8] Indeed, "Congress legislates against the strong background of the American Rule," and "[s]tatutes which invade the common law...are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 533-34 (1994) (internal quotation marks omitted).

allowing fees-on-fees. US.Br.15 n.7; accord 78 Fed. Reg. 36,248, at 36,250, 36,269, 36,271 (June 17, 2013) (fee guidelines for large Chapter 11 cases) ("Guidelines"). The Government's silence is curious given its heavy reliance below on the American Rule. C.A.Rec.282. Regardless, this Court has recognized "judicial exceptions" to the American Rule *only* in response to litigation misconduct, given courts' inherent authority over the course of litigation. *Alyeska*, 421 U.S. at 257-59. The Government's request for another, wholly different "judicial exception" contravenes this Court's precedent making clear that Congress has not "extended any roving authority to the Judiciary to allow counsel fees...whenever the courts might deem them warranted." *Id.* at 260.

3. Petitioners' and the Government's positions disregard § 330(a)(1)'s text.

Petitioners essentially ignore § 327(a) and rarely acknowledge § 330(a)(1)'s full text, instead selectively quoting "reasonable compensation" in isolation. Pet.Br.4, 6, 17, 21, 39-41. They quote the text in passing, but engage in no serious analysis of what the key terms in § 330(a)(1) mean.[9] Pet.Br.20-22.

Importantly, the Government rejects petitioners' textual analysis, agreeing that § 330(a)(1) provides a "limited" authorization of fees and specifically that § 330(a)(1)'s "services rendered" clause covers only

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[9] Petitioners' indifference to text allows them to find *Octane* controlling. Pet.Br.22, 33. Petitioners ignore that § 330(a)(1)'s text is different from 35 U.S.C. § 285, which is a fee-shifting statute. See *infra* Part I.C. Nothing in the Fifth Circuit's ruling creates an "extra-textual" limitation on fees as petitioners claim. Pet.Br.21, 33-34, 38. Its ruling simply gives effect to the *textual* limitations Congress imposed.

services "performed in the underlying bankruptcy case," and *not* fee-litigation work. US.Br.6, 13-14, 25, 31-34. Nonetheless, the Government claims fees-on-fees should be awarded as needed to avoid "dilution" of base fees. US.Br.14-20. This "dilution" concern is wrong on its terms, see *infra* Part II.A, but is *legally* indefensible as well.

First, this position defies § 330(a)'s text. The Government argues that fees-on-fees are merely "a component of 'reasonable compensation' for [the] underlying services." US.Br.15, 18, 33. But § 330(a)(1) authorizes "reasonable compensation *for...necessary services rendered by*" a professional. The compensation must be tied to the "services rendered," unless one reads the word "for" (and the words that follow) out of the statute. Because the Government agrees fees-on-fees work is not a "service[] rendered" under § 330(a)(1), there is no authority for awarding "reasonable compensation for" that *non-compensable* "service." The Government's view would allow "compensation for" *expressly non-compensable* services. Moreover, the Government ignores that § 330(a)(1), especially when read in light of §§ 327(a) and 328(c), does not treat adverse litigation over fees as an ordinary component of compensable fees. To the contrary, those provisions preclude an interpretation treating such adverse litigation fees as just another component of "reasonable compensation."[10]

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[10] The Government's view also runs counter to this Court's ruling in *Lamie* that attorneys can be compensated only if employed under § 327(a), 540 U.S. at 534, 537-38, which logically means they can be compensated only for services performed within § 327(a)'s scope of employment.

Second, the Government contravenes the American Rule by asking for a "judicial exception" based on an anti-dilution policy rationale. *E.g.*, US.Br.15 n.7, 18-19. The Guidelines—the stated basis for the Government's position here, US.Br.15 n.7—provide that "awarding compensation for matters related to a fee application after its initial preparation is generally inappropriate," except where the activities fall within a "judicial exception," such as where "the applicant substantially prevails." 78 Fed. Reg. at 36,250; see also *id.* at 36,269, 36,271, 36,275.

Such naked reliance on a "judicial exception" is doubly problematic. The need for a "judicial exception" confirms that § 330(a)'s text does not allow fees-on-fees, and the plea for a "judicial exception" beyond litigation misconduct ignores the well-established contours of the American Rule. See *supra* Part I.A.2. Indeed, the Government's anti-dilution rationale is not just an insufficient policy argument for ignoring the American Rule, but is essentially an argument against the American Rule itself, as attorneys' fees "dilute" amounts recovered by prevailing parties *whenever* disputes are litigated. If the possibility of dilution alone could justify fees-on-fees, fee-shifting would be the norm. But the American Rule presumes exactly the opposite. Cf. *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 408 (1990).

Third, the Government's position lacks credibility given its dramatic shift *in this case*. It acknowledges having argued below that fees-on-fees are disallowed "in all circumstances." US.Br.15 n.7. And, other than saying "reasonable compensation" can somehow be obtained "for" *non-compensable* "services," the Government has not wavered in its statutory view that fees-on-fees work is non-compensable.

But its changes of position on policy—with the same Trustee officials on both sets of briefs—are startling. See C.A.Rec.278-86, 344-46. For example:

- Below, the Government faulted the bankruptcy court for "bas[ing] its decision on two policy arguments" (including "dilution"), arguing the court "lacked authority to award fees on...policy grounds." C.A.Rec.282. Where fees are "incurred while successfully litigating against the estate," as opposed to "work...performed for the estate," the Government argued "the bankruptcy court's order is in the nature of a fee-shifting award." *Ibid.* After surveying American Rule precedent, the Government concluded that "the bankruptcy court's fee-shifting award is precluded by *Alyeska*." C.A.Rec.282-85.

- Further, the Government disputed the contention that "denying [fees-on-fees] would unfairly dilute...fees." C.A.Rec.345. It explained: "a bankruptcy professional should not be able to demand fees from a client that are unavailable outside of bankruptcy," and "requiring a professional to bear the normal litigation costs of litigating a contested request for payment...dilutes a bankruptcy fee award no more than any other litigation over professional fees." *Ibid.*

These are just highlights. The Government's prior arguments were made in the course of objecting to fees for pursuing a fee enhancement. US.Br.15 n.7. But its lead argument for disallowing those fees was that "the better-reasoned view" as to "whether a professional can even recover fees and expenses for prosecuting a fee application" is "that such an award

is generally precluded by the plain text of the Bankruptcy Code." C.A.Rec.278-81.

The Government points to the Guidelines as the reason for its about-face, US.Br.15 n.7, but the Guidelines do nothing to change the force of eminently correct statutory and policy arguments the Government embraced below. In any event, the rapidity with which the Government has changed its tune is a cautionary tale on relying on policy arguments in lieu of statutory text and the American Rule, which are both rooted in firmer soil.

4. Other § 330(a) provisions reinforce that fees for fee litigation are not authorized.

While §§ 327(a) and 330(a)(1) alone dictate that fee-litigation fees are non-compensable, other parts of § 330(a) buttress that view.

a. *Section 330(a)(4) ensures fee-litigation fees are non-compensable.*

Even if somehow compensable under § 330(a)(1), fees-on-fees would be barred by § 330(a)(4). Section 330(a)(4) provides that a court "shall not allow compensation for" services that were not "(i) reasonably likely to benefit the debtor's estate; or (ii) necessary to the administration of the case."[11]

i. Petitioners barely mention the "benefit the...estate" element of § 330(a)(4), and for good rea-

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[11] In responding to comments regarding the Guidelines, the Trustee maintained that fee-litigation work is neither beneficial to the estate nor necessary to the case under § 330(a)(4)(A)(ii). 78 Fed. Reg. at 36,269. The Government never refutes that view and appears to agree with the Fifth Circuit on § 330(a)(4) insofar as fees-on-fees are not "independently compensable." US.Br.24-25.

son. As the Trustee has explained, "time spent...explaining the fees, negotiating objections, and litigating contested fee matters...are properly characterized as work that is for the benefit of the professional and not the estate." 78 Fed. Reg. at 36,250; see also C.A.Rec.279-80. Fee-litigation work "benefits" *only* the attorneys and has the ultimate goal of *diminishing* the "estate." § 330(a)(4); see *Grant* v. *George Schumann Tire & Battery Co.*, 908 F.2d 874, 883 (11th Cir. 1990).

To argue otherwise, petitioners resort to an indirect-benefits theory that renders § 330(a)(4)(A)(ii)(I) limitless. They claim allowing fees-on-fees would ("general[ly]") benefit the bankruptcy system by attracting competent counsel, which "indirectly [benefits] each estate participating in the system." Pet.Br.25-26 (internal quotation marks omitted). That rationale would essentially replace "benefit the...estate" with "benefit the lawyers" and allow compensation for anything that puts more money in the lawyers' (or other § 327(a) professionals') pockets. But § 330(a)(4) requires that "*services*" "benefit the...estate," which mandates a far more direct connection. Petitioners suggest estates have an "interest" in knowing how much to pay professionals. Pet.Br.26. Saying § 330(a)(4) allows an attorney to *diminish* the estate by using its funds on self-interested fees, because the estate "benefits" from knowing exactly how much it has been harmed, is—to put it mildly—an odd construction of "benefit."

ii. Likewise, petitioners' contention that fees-on-fees work is "necessary to the administration of the case" would render § 330(a)(4)(A)(ii)(II) meaningless as a limit on compensation. Pet.Br.25. Petitioners again claim fee-litigation work is "necessary" be-

cause the trustee needs to know how much to charge the estate, but that would make *anything* conceivably chargeable to the estate "necessary." However "necessary" an attorney feels it is to pursue fees and engage in litigation against the estate, that does not make it "necessary *to the administration of the case.*"

Petitioners' "necessary" argument tries to blur the distinction between preparing and defending fee applications. Pet.Br.25. But one can conclude preparing fee applications is "necessary" to the case while defending them is not, particularly because of § 330(a)(6). See *infra* Part I.A.4.b. Fee-application preparation is "necessary" for the straightforward reason that *the bankruptcy rules require it.* Fed. R. Bankr. P. 2016(a). That was true when Congress enacted §§ 330(a)(4) and 330(a)(6). Fed. R. Bankr. P. 2016(a) (1994). An application is thus required *by law* for professionals to be compensated. 78 Fed. Reg. at 36,250. But petitioners cannot plausibly contend that fee *litigation* is needed to close the case or that fee-litigation work adverse to the estate is somehow necessary to administration of the case.

iii. Petitioners argue § 330(a)(4)(A)(ii) should be read to make services compensable if they are *either* "beneficial" *or* "necessary." Pet.Br.7, 32-34, 37-38. The Court need not resolve this question, as fee-litigation work is neither beneficial nor necessary under § 330(a)(4).

Regardless, the better reading of § 330(a)(4) is that services are *"not"* compensable if they are either *not* beneficial or *not* necessary—i.e., they must be *both* beneficial and necessary to be compensable. Accord *Smith*, 317 F.3d at 926; C.A.Rec.279-80 (Government below). Section 330(a)(4)(A)'s "shall not allow compensation for" clause introduces multiple at-

tributes that independently make "services" *not* compensable. The provision uses the disjunctive "or" between the disqualifying attributes because it is framed in the negative, meaning it indicates that services falling in *any* prohibited category are non-compensable. As to § 330(a)(4)(A)(ii), services are non-compensable if they are "not" beneficial "or" necessary. Because the "or" follows "not," under settled interpretive rules, the provision means services are non-compensable if they are "not" beneficial and if they are "not" necessary. Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 119 (2012) (principle that not A or B means not A and not B).[12] This construction makes sense, too, ensuring that estates pay for only those services that are *both* necessary and beneficial.

b. *Section 330(a)(6) removes any doubt that fees for fee litigation are not authorized.*

i. Section 330(a)(6) provides that "[a]ny compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application." This provision eliminates any doubt as to whether fees incurred in preparing fee applications are compensable. It resolves any such doubt with a qualified "yes": preparation work is compensable at a level commensurate with the relatively ministerial process of preparing

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[12] *Amicus* State Bar of Texas Bankruptcy Section purports to apply this principle (at 9-10), but it forgets that the word "not" appears twice in § 330(a)(4)(A)(ii) and it thus changes the meaning by divorcing the "shall *not* allow compensation" clause from the two "conditions" in its chart. There shall *not* be compensation for services that are not beneficial and there shall *not* be compensation for services that are not necessary.

an application. Yet *nothing* in § 330(a) expressly includes fee-litigation work.[13] It would violate bedrock principles of statutory construction and the long-established American Rule to conclude that fees associated with litigating a fee dispute are compensable in the absence of explicit authority. That is particularly true because preparation work is performed by all professionals and can readily be seen as the last step in providing necessary services, while fees for adversarial litigation fully implicate the American Rule's requirement of express statutory authorization. See *supra* Part I.A.2.

Petitioners and the Government miss the significance of § 330(a)(6) and the American Rule, framing the debate as whether § 330(a)(6) itself authorizes preparation fees or merely confirms they are authorized by § 330(a)(1). Pet.Br.30-31; US.Br.23-24. That is not the dispositive question. Whether or not § 330(a)(6) is a grant of authority, it reflects Congress's *express* intent to provide compensation for preparation work, while *nothing* does that for fees-on-fees work. See, *e.g.*, *In re CCT Commc'ns, Inc.*, 2010 WL 3386947, at *8 (Bankr. S.D.N.Y. 2010). That difference is dispositive under the American Rule and is enough to resolve the question here.[14]

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[13] Before the 1994 amendments that added § 330(a)(6), courts had split on whether both preparation and defense fees were recoverable, and in testimony before Congress, the American Bankruptcy Institute urged Congress to make both "expressly compensable." *In re Wireless Telecomms. Inc.*, 449 B.R. 228, 236 (Bankr. M.D. Pa. 2011) (internal quotation marks omitted). Yet Congress chose to expressly address only fee-application preparation in § 330(a)(6).

[14] Further, if the Court were to agree with the Government that time spent preparing fee applications is not a "ser-

ii. Even if § 330(a)(6) is read to confirm preparation work is compensable under § 330(a)(1) and (a)(4), that does not advance petitioners' cause for multiple reasons.

First, preparation services are distinguishable from fee-litigation work under § 330(a)'s text. While the heart of § 330(a)(1)'s authorization is for core bankruptcy work, accord US.Br.31, one can interpret that provision as including at its outer edge the *preparation* of fee applications, especially when read together with § 330(a)(6). A professional's discrete act of preparing a fee application for the trustee may be viewed as a "service rendered" for the trustee as part of the § 327(a) role. Indeed, for a § 327(a) professional hired to serve the trustee, completing the statutorily-required application can be considered the *last* "service rendered" for the trustee. It is comparable to a person having a dealer repair a car and prepare an itemized bill listing the work performed; the bill is the final service rendered and marks the completion of the requested task. But in no sense

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vice rendered" under § 330(a)(1), US.Br.32-33, yet disagree with the Government's policy-based argument that preparation work is nonetheless compensable under § 330(a)(1) to avoid "dilution," then nothing *but* § 330(a)(6) authorizes fees for preparing fee applications. In that event, while § 330(a)(6)'s text may not be the most natural language for authorizing something new, it must be read as authorizing preparation work in order to make sense of § 330(a) as a whole. Cf. *Lamie*, 540 U.S. at 534-36 (recognizing Congress's work *in § 330(a)* was "awkward" and "ungrammatical," but giving effect to text, even with "surplusage"). Some courts and commentators have referred to § 330(a)(6) as providing for fees for preparation work. *E.g.*, *Boyd* v. *Engman*, 404 B.R. 467, 482 (W.D. Mich. 2009); 3 Collier ¶¶ 330.03[16][a][i], 330.LH[5]; accord C.A.Rec.279-81 (Government below); Pet.App.135a.

can ensuing adversarial litigation about payment be considered a "service rendered by" the professional for the trustee; the professional's pursuit of fees is purely for the professional's benefit. Accord US.Br.31-32; 78 Fed. Reg. at 36,250, 36,269.

Additionally, preparing fee applications is "necessary" within the meaning of § 330(a) (particularly in view of § 330(a)(6)), in that it is required by rule. Fed. R. Bankr. P. 2016(a). But petitioners cite nothing to suggest adversarial fees-on-fees work is required by law or is otherwise "necessary" within the meaning of § 330(a) and the limited scope of employment under § 327(a). See *supra* Part I.A.4.a.

Second, these services are distinct by nature. Fee-application preparation is a non-adversarial, ministerial conclusion to an engagement, as Congress recognized when it limited compensation for this task in § 330(a)(6). Self-interested fee disputes, adverse to the estate, are totally different. Petitioners' request for fees-on-fees goes an extra standard deviation beyond the core of § 330(a).

This conclusion is underscored by the fact that § 330(a) applies to all professionals. Preparation of fee applications, whether by lawyers or accountants, is a necessary part of providing services for the trustee, but that process is a far cry from adversarial litigation over fees—as seen most starkly in the context of a non-lawyer professional. There is an obvious difference between compensating an accountant for a fee application governing accounting services, and compensating the accountant's lawyers for litigating a challenge to those fees.

Third, petitioners' reliance on "parity" works against them here. "Fee applications...have no coun-

terpart in most areas of legal practice." *In re St. Rita's Assocs. Private Placement*, 260 B.R. 650, 652 (Bankr. W.D.N.Y. 2001). "In contrast, fee disputes are common to all areas of legal practice," and outside bankruptcy the American Rule generally requires each side to bear its fees. *Ibid.* The Government recognizes all of this. 78 Fed. Reg. at 36,250, 36,269; cf. US.Br.25-26. "Parity" differentiates these services, supporting compensation only for preparation work.

Given the Government's prior recognition of most of these meaningful distinctions, its unexplained claim of "no apparent reason to conclude" that the services should be treated differently reeks of willful blindness. US.Br.13, 23.

iii. Petitioners and the Government invoke *Commissioner, INS* v. *Jean*, and the Court's statement that it perceived "no textual or logical argument" to distinguish fee-application preparation and defense work under the Equal Access to Justice Act's (EAJA) fee-shifting provision. 496 U.S. 154, 162 (1990) (addressing 28 U.S.C. § 2412(d)). Their reliance is wholly off-base. The EAJA provision is a broad fee-shifting statute with a different textual authorization than § 330(a)(1), as it open-endedly authorizes "fees" to the "prevailing" party in litigation. See *infra* Part I.C. *Everyone* in *Jean* conceded fees-on-fees were within that *express* authorization for fees. 496 U.S. at 162. The only question was what showing was needed to get those fees. *Ibid.* Because that fee provision allowed fees only if the Government's position was "not substantially justified," the Government argued plaintiffs could not get fees-on-fees unless its position in the fee litigation itself—and not just in the underlying dispute—was "not

substantially justified." *Id.* at 157. The Court rejected that argument, holding fees-on-fees may be awarded without a second "not substantially justified" finding. *Id.* at 165-66.

The Court's statement about distinguishing between preparation and defense of fee applications came in the context of answering that narrow question, with the Court finding no reason to have a different trigger for *authorized* preparation work and *authorized* fee-litigation work. *Id.* at 161-62. Here, though, the question is whether fees-on-fees are authorized at all. And, unlike a typical fee-shifting statute, there are ample textual bases in § 330(a) for distinguishing fee-preparation and fee-defense work. Not only does § 330(a)(6) reference only the former, but as explained above, the text of §§ 330(a)(1), 330(a)(4), 327(a), and 328(c) all provide bases for distinguishing between preparation work—which can be seen as the last service rendered to the trustee for the benefit of the estate—and fee-defense work. So unlike the EAJA in *Jean*, there are "textual" reasons for treating these services differently. And there are "logical" reasons for doing so as well, because of the unique bankruptcy context and the force of the American Rule.

c. *Section 330(a)(3)'s factors confirm the Fifth Circuit's ruling.*

Rather than analyze what § 330(a)(1) *authorizes* or § 330(a)(4) *excludes*, petitioners rely heavily on § 330(a)(3). Pet.Br.17-18, 23-30. But § 330(a)(3) outlines "factors" courts consider "[i]n determining the amount of reasonable compensation" to award. By its terms, § 330(a)(3) comes into play to determine the "amount" of compensation only *after* a court has determined services are compensable under

§§ 327(a) and 330(a)(1). Section 330(a)(3)'s factors are irrelevant if services are non-compensable. Petitioners' use of § 330(a)(3) to determine what fees are authorized in the first place is mistaken.

This over-emphasis on § 330(a)(3) leads petitioners to wrongly accuse the Fifth Circuit of mixing the words "case" and "estate" in § 330(a). Pet.Br.23-25. They even try linking this to Congress's shift from an "economy of the estate" view, suggesting the Fifth Circuit missed that change in requiring that all services benefit the "estate." Pet.Br.23-25, 27, 34-39. As the Government agrees, US.Br.10, 24-25, that part of the Fifth Circuit's opinion held fees-on-fees work is not compensable *under § 330(a)(4)*—which says "benefit the...*estate*." See Pet.App.15a (emphasis added). Further, the court recognized the departure from "economy of the estate," Pet.App.18a, and nothing in its opinion harkens back to that era.

Petitioners' analysis of the factors is also off-base. They rely heavily on § 330(a)(3)(F)'s comparability factor, which addresses whether "the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners" in non-bankruptcy cases. They miss that parity is achieved by *refusing* fees-on-fees in bankruptcy, see *infra* Part II.A.1, which demonstrates that the comparability factor supports the Fifth Circuit's rule. Regardless, there is no *textual* support for petitioners' attempt to take one factor from § 330(a)(3)'s list and crown it supreme for deciding what § 330(a) authorizes. It is not remotely an "express" *authorization* of fees-on-fees; it is merely one factor for determining a fee *amount*.

Petitioners also focus on § 330(a)(3)(C)'s factor addressing whether services are necessary and bene-

ficial to the case. Pet.Br.23-26. As explained above, fees-on-fees work is barred by § 330(a)(4) because it does not benefit the estate and is not necessary to the case. The same analysis dictates that such work is not necessary to the case under § 330(a)(3)(C), and it is not clear how services that do not "benefit the...estate" and are not "necessary" to the case can nonetheless be "beneficial" to the case.

* * *

In sum, § 330(a)'s limited authorization for fees cannot be read to include fees-on-fees. Petitioners try to couch their arguments in textual terms, but are really left with policy pleas. Similarly, the Ninth Circuit and other courts adopting petitioners' position have recognized that § 330(a) is, at most, "silent" about fees-on-fees. *Smith*, 317 F.3d at 928; see, *e.g.*, *CCT Commc'ns*, 2010 WL 3386947, at *8-9. Yet the Ninth Circuit followed Judge Reinhardt's "dilution" rationale in *In re Nucorp Energy, Inc.*, 764 F.2d 655, 660-61 (9th Cir. 1985), indulging policy to allow fees-on-fees. This approach invades the province of Congress in violation of the American Rule, and is contrary to basic statutory-interpretation principles. The Court should defer to Congress and enforce the text as written. *Lamie*, 540 U.S. at 538, 542.

B. Petitioners' and the Government's views would allow fees for *unsuccessful* fee defenses and other collateral fees.

Further proof that petitioners' and the Government's positions are wrong is that they lead to impractical, indeed absurd, results. *E.g.*, *McNeill* v. *United States*, 131 S. Ct. 2218, 2223 (2011).

1. As the Government explains, petitioners' textual argument would allow fees-on-fees *regardless* of

whether the fee applicant is successful. US.Br.32-33. Petitioners believe fees-on-fees work is a "necessary service[] rendered" under § 330(a)(1) that satisfies § 330(a)(4) as *either* necessary *or* beneficial because it informs the trustee what the estate owes. Pet.Br.22-26. If so, nothing in § 330(a)(1) limits fees-on-fees based on success, and the § 330(a)(4) argument would be true regardless of whether a fee applicant succeeds. US.Br.33 & n.12. That petitioners' reading would allow the absurdity of awarding fees-on-fees, even where the base fees are not compensable, proves their interpretation is untenable.

The words "reasonable compensation" do not help petitioners avoid this result. Their position is that fee-litigation work is *itself* a compensable service. If that is correct, then determining "reasonable compensation for" that "service" merely goes to the amount of fees, as there is no hint of a prevailing-party *requirement* in § 330(a)(3). Indeed, imposing a success requirement through the "reasonable compensation" language would be disastrous for bankruptcy professionals because it would necessarily apply across the board—to all compensable "services"—in undifferentiated fashion.[15] Allowing as "reasonable" only compensation for successful services would turn *all* bankruptcy professionals into

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[15] In specific cases, courts may go beyond the § 330(a)(3) factors and exercise discretion to refuse compensation for unsuccessful fees-on-fees work. But petitioners cannot deny that, under their "reading" of the text, nothing in the statute *precludes* a court from awarding such compensation.

contingency-fee actors, which is obviously not what Congress intended.[16]

Nor is the Government entirely immune from this problem. It apparently crafted its legal justification to achieve its desired substantially-prevails result, tying fees-on-fees to the compensation for underlying services. But in doing so, it advocates a hindsight-based rule for awarding "reasonable compensation" that is similar to the one it opposes for judging whether services are beneficial or necessary. See US.Br.33 n.12; Supp. Br. of Trustee on Reh'g En Banc at 10-16, 2015 WL 136284, *In re Woerner*, 771 F.3d 820 (5th Cir. 2014) (No. 13-50075). And its strained effort to make the text fit a prevailing-party rule is implausible. Any argument that § 330(a) compensates only for successful fee fights has no mooring in the statute.

2. Additionally, under petitioners' and the Government's arguments, there is no way to distinguish fees-on-fees from fees incurred seeking enhancements or other collateral fees incurred in conceivably endless litigation over a proper fee amount. Petitioners sought fees-on-fee-enhancements below and argued there is no principled basis for distinguishing them from fees-on-fees. Sealed.C.A.Rec.208. If fees-on-fees work is a "necessary service[] rendered" and is "necessary" and "beneficial" because it lets the trustee know how much to charge the estate, *any* collateral work would be as well—fees-on-fee-enhancements, appellate fees, and more.

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[16] Reading a contingency-fee requirement into § 330(a) would also conflict with § 328(a), which allows professionals to contract for contingency fees as an alternative to § 330(a).

The Government objected below to enhancement-related fees, C.A.Rec.278-86, but now contradicts that by adopting the rationale that collateral fees are allowed to avoid dilution of underlying fees. If an enhancement is proper under § 330(a), the anti-dilution rationale logically allows fees spent pursuing the enhancement. The Government offers nothing to avoid this result. Given the Court's caution about enhancements even under open-ended fee provisions like 42 U.S.C. § 1988, *Perdue* v. *Kenny A. ex rel. Winn*, 559 U.S. 542, 550-60 (2010), positions allowing *fees-on*-fee-enhancements go the wrong way.

C. The comparison to fee-shifting statutes is misplaced.

Petitioners' and the Government's myopic focus on "reasonable compensation" leads them to compare § 330(a) to fee-shifting statutes. But the comparison actually proves § 330(a) is nothing like the kind of fee-shifting statutes that focus on attorneys' fees and prevailing parties, and that demonstrate the kind of clarity needed to reverse the American Rule.

1. For one thing, petitioners and the Government disregard this Court's precedent by ignoring *text* when comparing § 330(a) to fee-shifting statutes. Where "statutory deviations from the American Rule" differ in their language, an interpretation of one does not control another. *Hardt*, 560 U.S. at 253-54. Thus, interpretations of prevailing-party statutes do not govern statutes lacking prevailing-party text. *Ibid.* Courts should "not...apply rules applicable under one statute to a different statute without careful and critical examination." *Gross*, 557 U.S. at 174 (internal quotation marks omitted).

Yet petitioners treat the statutes as virtually fungible, asserting the fee-shifting statutes have language "similar to" or "like" § 330(a)—without analysis. Pet.Br.40-41. And the Government's claim that fee-shifting provisions are "highly instructive" for construing § 330(a), US.Br.12, without attempting to compare the text, is akin to treating all arbitration or preemption clauses the same regardless of their language—contrary to this Court's precedent. See, *e.g.*, *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989); *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring).

2. Petitioners' and the Government's disregard for text leads them to miss that their cited statutes use similar language that is nothing like § 330(a). Specifically, all the fee-shifting statutes that petitioners and the Government cite broadly authorize "a reasonable attorney's fee"—or "fees" or "reasonable attorney fees" or "reasonable litigation costs"—almost always to a prevailing party, for pursuing *an adversarial action*. See 42 U.S.C. § 1988(b); 28 U.S.C. § 2412(d); Pet.Br.40-43 & n.13; US.Br.19-20. Section 330(a)'s authorization differs from these fee-shifting statutes in several key respects.

First, § 330(a) has no prevailing-party element; *nothing* hints at a loser-pays regime. That omission is hardly surprising. In the bankruptcy context—unlike the civil-rights context—attorneys are representing the trustee, and there will not be well-defined "losers" and "winners" for purposes of allocating fees. Section 330(a) authorizes fees for services rendered with no prevailing-party trigger.

Second, § 330(a) is not a specialized provision for attorneys, but instead addresses compensation for all

professionals. That undercuts the notion that § 330(a) somehow abrogates the American Rule *for attorneys* for litigation adverse to the estate.

Third, Congress did not broadly authorize a "reasonable attorney's fee" in § 330(a); rather, it provided a limited authorization of fees for specific *services*. See *supra* Part I.A. This Court has observed that a broad, open-ended statutory authorization for "fees...incurred" in a "civil action" is for all aspects of the designated action, including fees-on-fees.[17] *Jean*, 496 U.S. at 161-62. Yet Congress did not use such broad language in § 330(a). As the Government admits, fees-on-fees work is *not* a "service[] rendered" in § 330(a)(1); that express grant is only for the underlying bankruptcy work. US.Br.31-33.

Congress's decision to use narrower language in authorizing compensation under § 330(a) is particularly significant given the fact that, elsewhere in the Code, Congress more broadly authorized "reasonable attorneys' fees" or a "reasonable attorney's fee." *E.g.*, 11 U.S.C. §§ 110(i), 523(d). These provisions operate as fee-shifting statutes, awarding *attorneys'* fees to *prevailing* parties from other parties (not the estate) after *adversarial proceedings* that arise in bankruptcy. *Ibid.* That Congress provided for fee-shifting elsewhere in the Code confirms that its more limited authorization in § 330(a)(1) was a deliberate decision not to enact a fee-shifting regime for professionals.

To gloss over these textual differences, petitioners just repeat that § 330(a)(1) allows "reasonable

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[17] The fee-shifting statutes do not authorize fees-on-fees *by name*, Pet.Br.40-43; US.Br.19, but that is not the point. The express grants of authority in those statutes are broad enough to encompass fees-on-fees work.

compensation," Pet.Br.4, 39-44, apparently wanting the Court to think "reasonable compensation" sounds like "reasonable attorney's fee" and assume the comparison is apt. Similarly, the Government quotes *only* "reasonable" from the statutes to imply they are the same. US.Br.19-22. But as discussed at length above, § 330(a)(1) awards reasonable compensation only "for...necessary services rendered."

3. The textual distinctions between fee-shifting statutes and § 330(a) reflect important differences between the regimes Congress established.

The fee-shifting statutes address adversarial proceedings where there are two sides and one winner. In that context, and given policy objectives such as encouraging the vindication of certain constitutional or statutory rights, Pet.App.17a, Congress has used similar language from statute to statute, and concerns about dilution are apt because an attorney for a non-prevailing plaintiff may receive no compensation at all.

Section 330(a) creates a totally different regime. In bankruptcy, multiple parties have a stake in the outcome, and numerous professionals serve various interests. There is no fee "shifting" in § 330(a); it is a compensation scheme, using estate funds, for all professionals' services—whether those services are performed by lawyers, accountants, or auctioneers.

Nothing in § 330(a)(1) states that compensation turns on who prevailed or whether the services achieved success. For example, petitioners' ability to recover base fees for their work in the bankruptcy did not depend on ultimate success; they received compensation because they rendered services for the

trustee, on behalf of the estate. See, *e.g.*, *Grant*, 908 F.2d at 882-83.

The prevailing-party comparison is especially inapt because, in the usual bankruptcy, the "losing" objector would not directly pay the fees—the estate would foot the bill. This case is unusual because it was a full-pay case, making the objecting party the one that would bear the fees-on-fees. In most bankruptcies, however, there are insufficient estate funds to compensate all constituents, so estate stakeholders (typically creditors) will bear the cost. See *infra* Part II.B. But in such cases, the entities that "pay" for fees-on-fees often would not be the ones objecting. As the Fifth Circuit stated, "the equities are quite different" in bankruptcy.[18] Pet.App.17a.

Finally, the difference between the two regimes is underscored by §§ 327(a) and 328(c). Far from assuming adversarial litigation where the loser pays, those provisions forbid adverse interests between the professional seeking additional fees and the estate that will pay the additional fees. The typical fee-shifting statute designed for adversarial litigation, and the bankruptcy regime of §§ 327, 328, and 330(a), are truly apples and oranges.

4. Below, when contending *Perdue* did not control their fee-enhancement requests, petitioners recognized the *textual* differences between § 330(a) and

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[18] This is what the Fifth Circuit meant about "[n]o side wear[ing] the black hat," Pet.App.17a, which petitioners take out of context. The court also noted that fee-shifting encourages claims vindicating certain rights, to hold to account violators of federal law. Pet.App.17a; accord *Fox*, 131 S. Ct. at 2213; *Jean*, 496 U.S. at 163-65. The latter interests have no analogue in bankruptcy.

fee-shifting statutes. *E.g.*, C.A.Rec.319 (Jordan, Hyden: "almost universally recognized" § 330(a) "is not a fee shifting statute"); see Sealed.C.A.Rec.114-27; C.A.Rec.312-22. Baker Botts recognized that the text of § 330(a) differs markedly from § 1988; that § 330(a) creates a distinct statutory regime; and that § 330(a) is not a prevailing-party statute because it involves compensation by a beneficiary of services to an advisor, *not* shifting fees from a loser to a winner.[19] Sealed.C.A.Rec.115-17, 124-25. The fee-shifting statutes offer no support for petitioners or the Government.

II. Congress's Decision Not To Compensate For Fee-Litigation Work Under § 330(a) Advances Important Policy Objectives.

Taking a cue from the Ninth Circuit and other courts adopting their position, petitioners and *amici* emphasize policy arguments about "parity" and "dilution" above all else. Those arguments, of course, provide no basis for departing from the clear text of § 330(a), but they also fail on their own terms.

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[19] In the fee-enhancement context, where the question is what test to use in awarding enhancements, ASARCO analogized to *Perdue* because fee enhancements in bankruptcy cases have been guided by fee-shifting case law on enhancements. *E.g.*, Sealed.C.A.Rec.27-31. The courts below rejected that analogy, agreeing with petitioners' distinctions. There is certainly no cause for analogizing § 330(a) to fee-shifting statutes in the fees-on-fees context, where the question is what § 330(a) authorizes, and the textual limitations described above make the fee-shifting statutes inapposite.

A. The Fifth Circuit's rule achieves Congress's desire for parity.

1. Refusing fees for fee litigation treats bankruptcy and non-bankruptcy lawyers the same.

a. While petitioners repeatedly trumpet the need for "parity," that principle supports ASARCO's view. No one disputes that the American Rule applies outside bankruptcy and generally precludes fee-shifting because non-bankruptcy professionals do not charge for time spent explaining or defending bills. See US.Br.26, 30 n.11; 78 Fed. Reg. at 36,250, 36,269; *In re Teraforce Tech. Corp.*, 347 B.R. 838, 867 (Bankr. N.D. Tex. 2006). If a non-bankruptcy lawyer and a client have a dispute over a fee and end up in litigation, the lawyer could not with a straight face send the client yet another bill seeking payment for the costs of that litigation.

Petitioners try to assume this point away, noting that "[o]utside of bankruptcy, a client's willingness to pay ends the matter." Pet.Br.18. But the relevant question is what happens when a client refuses to pay. Outside bankruptcy, attorneys must pay their own way in fee disputes unless there is an exception to the American Rule. *St. Rita's*, 260 B.R. at 652; see also *In re Wireless Telecomms. Inc.*, 449 B.R. 228, 236-37 (Bankr. M.D. Pa. 2011); *Brous*, 370 B.R. at 572. That is true for fee disputes with clients *or* with third parties like insurers or increasingly-used outside fee-auditing companies.

Petitioners and the Government believe the only relevant comparison is the fee-shifting context. Pet.Br.28; US.Br.26. But § 330(a) is not comparable to fee-shifting statutes textually, see *supra* Part I.C,

so *Congress* did not think bankruptcy attorneys should be treated the same as lawyers litigating those cases. Nor should the fee-shifting context be the proper baseline among non-bankruptcy areas. Lawyers in fee-shifting cases typically get paid *nothing* if they do not prevail. In that context, it may be particularly important to ensure lawyers get an "undiluted" fee when they do win. But, barring administrative insolvency, bankruptcy lawyers get paid for their services rendered win, lose, or draw, as long as their work benefits the estate and is not duplicative or otherwise unnecessary. Thus, bankruptcy lawyers are more comparable to corporate lawyers and commercial litigators than to civil-rights litigators who will have worked *pro bono* if they do not prevail. Parity applies both ways, *e.g.*, *In re Gulf Consol. Servs., Inc.*, 91 B.R. 414, 418 (Bankr. S.D. Tex. 1988), and supports *disallowing* fees-on-fees.

b. Petitioners' and *amici*'s response to this reality about non-bankruptcy work is to argue that fee objections are uniquely likely in bankruptcy, given that multiple parties can review and object to fee applications. Pet.Br.4, 27-29; US.Br.26.

At the outset, even if objections were more likely in bankruptcy, that would just make Congress's silence all the more telling. Congress surely knew that the system it was structuring would allow broad review of and potential objections to fee applications, so its limited fee authorization and its refusal to provide attorneys' fees for successful fee defense could hardly have been accidental. And if Congress had addressed the issue, it might have decided to have fees paid by the objector rather than the estate, a result that even the Government seems to recognize would reflect a better policy choice. Cf. US.Br.30-31

("more appropriate source for an award of fees" is to sanction objectors where objections were frivolous or otherwise abusive, since it "place[s] the burden of defense fees on the responsible party rather than on innocent creditors"). But of course, Congress did not expressly provide for fees-on-fees at all, which has clear consequences under the American Rule.

Further, the notion that objections are more likely in bankruptcy is a fallacy. While more parties *can* object, none of them has as strong an incentive to review and object as a non-bankruptcy *client* (or loser under a fee-shifting statute) has. Outside bankruptcy, a client (or its insurer or manager) is the one paying the bills, so it has every reason to demand a detailed invoice, review it carefully, and object. Cf. Meg Charendoff, *Survey Of General Counsel Shows There Is Much Ado About Money*, THE LEGAL INTELLIGENCER, Jan. 16, 2008 (survey showing "almost half" of respondents regularly question outside counsel about bills); Laura James, *Under A Microscope: Legal Bill Review Companies Can Put Carriers, Defense Bar In a Tough Spot*, MICHIGAN LAWYERS WEEKLY, Feb. 15, 2013 (more insurers are using "outside legal bill review firms who sometimes work on commission and whose stated mission is to cut payments to attorneys who do insurance defense work"). Clients, insurers, and non-parties have no qualms raising objections to fees outside bankruptcy.

In bankruptcy, by contrast, no single party has the full incentives of a client. Bankruptcy courts and the Trustee have duties to monitor fees, and creditors and others can review fees to ensure the estate is not being inappropriately diminished. But none of them "open[s] its checkbook to pay" the bill in the way a typical client does, which, if anything, makes

getting paid harder outside bankruptcy than in it. *In re The Vogue*, 92 B.R. 717, 725 (Bankr. E.D. Mich. 1988). In fact, bankruptcy practice is characterized by strong incentives for parties *not* to object to fees. The Fifth Circuit and other courts have repeatedly recognized the "conspiracy of silence" that exists in bankruptcy, whereby professionals share the "mutual goal of securing approval for their fees," so they do not contest each other's fee applications. *In re Consol. Bancshares, Inc.*, 785 F.2d 1249, 1255 (5th Cir. 1986); see Pet.App.20a; *In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 843 (3d Cir. 1994).

In sum, petitioners and *amici* are not merely seeking "parity"; they are seeking a windfall that would allow them to recover litigation costs that are unavailable to most non-bankruptcy practitioners.[20]

2. The dilution concern is unfounded.

Related to "parity" is the policy concern that refusing fees-on-fees may dilute core awards. The Government's prior answer to this is correct and decisive: the concern is "without merit" because the same potential for dilution exists outside bankruptcy. C.A.Rec.345; accord 78 Fed. Reg. at 36,269; *In re DN Assocs.*, 165 B.R. 344, 354 (Bankr. D. Me. 1994). Non-bankruptcy attorneys are subject to the American Rule, which means their awards are "diluted" whenever they have to defend their fees in litigation. If parity is the goal, there is no basis for awarding fees-on-fees under § 330(a), because it would make dilution *uniquely* avoided in bankruptcy.

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[20] Further undermining any complaints about "parity," bankruptcy lawyers are also allowed to bill the estate for time spent *preparing* fee applications. § 330(a)(6). Non-bankruptcy lawyers are rarely, if ever, compensated for preparing bills.

Further, non-bankruptcy rates account for factors like risk of non-payment or the costs of obtaining payment. *E.g.*, *In re Gibbons-Grable Co.*, 151 B.R. 814, 817 (N.D. Ohio 1992). Because bankruptcy professionals use non-bankruptcy rates (which already account for the risk of dilution), allowing fees-on-fees would be a windfall for such professionals. This reality also demonstrates that the Government's (current) position is unworkable in practice. Because lawyers' standard hourly rates typically already account for a risk of dilution or non-payment, courts would have to subtract this risk premium from hourly rates in the process of calculating the amount of fees-on-fees needed to avoid "dilution." That offset would be critical, to ensure bankruptcy lawyers are not overcompensated, but it would be complicated and burdensome to make the necessary calculations.

The dilution concern also misses another key point: sufficient safeguards already exist to avoid dilution and meritless objections. Pet.App.20a-21a. First, parties have a strong disincentive against objecting because they have to bear their costs in fee disputes. Petitioners say objectors can act "with little cost," Pet.Br.5, but ASARCO spent nearly $2 million in fees to pursue what it believed to be legitimate objections. That refutes the unfounded accusation that ASARCO was acting to "[e]xact[] revenge." *Ibid.* The built-in incentives dictate that parties will object, and bear the costs of litigating objections, only when they perceive a reasonable chance of success.

Second, the "rules require professionals to justify their fee applications with detailed, itemized billing records precisely to assure their integrity and sharpen any potential disputes." Pet.App.17a. If profes-

sionals comply, that "should ordinarily reduce the need for or likelihood of success of satellite litigation over fees." *Ibid.*; accord 78 Fed. Reg. at 36,274-75.

Third, bankruptcy courts can award fees as a sanction against parties whose objections are frivolous, Fed. R. Bankr. P. 9011(c)(2), or who act in bad faith or vexatiously, *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 45-46 (1991).[21] Below, the Government deemed this a "sufficient deterrent" against baseless objections and argued "[t]here is no reason to provide a bankruptcy professional with protections not available to non-bankruptcy litigants." C.A.Rec.345-46. Petitioners think these protections lack teeth because parties will walk a line between frivolous and merely meritless objections. Pet.Br.55. That ignores the built-in disincentives discussed above and wrongly pretends parties *could* knowingly walk that line—never mind cynically presuming they would *want* to. The American Rule's longstanding exceptions for bad-faith, vexatious, or frivolous conduct—which, of course, are the *only* exceptions to the Rule available outside bankruptcy—are more than sufficient protection against undue dilution of bankruptcy fees.

3. Petitioners also misunderstand parity.

Petitioners are wrong not only about whose rule achieves parity and what role it plays in § 330(a), but also about what parity has meant and means today.

a. Petitioners suggest the 1978 Act mandated complete equality between bankruptcy and non-bankruptcy practice in every particular. In fact, Congress's main focus was *rate* parity.

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[21] No one suggests ASARCO's objections triggered these exceptions—nor could they. See Pet.App.21.

Prior to the 1978 Act, Congress was concerned specialists "would leave the bankruptcy arena" because courts were setting "arbitrary limit[s]" on rates. H.R. Rep. No. 95-595, at 330 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6286. Thus, in 1978 it authorized courts to award "reasonable compensation for...necessary services rendered...based on...the cost of comparable services" in non-bankruptcy cases. 1978 Act. As Congress confirmed, "the policy of [§ 330(a)] [was] to compensate...professionals serving in a [bankruptcy] case...at the same rate as the...professional would be compensated for performing comparable services" in a non-bankruptcy case. 124 Cong. Rec. 32,394 (1978) (Statement of Rep. Edwards); accord 124 Cong. Rec. 33,994 (Statement of Sen. DeConcini). It was so alarmed by courts slashing rates that it reported its intent to overrule two cases involving such rate-discounting. See 124 Cong. Rec. 32,395; 124 Cong. Rec. 33,994; H.R. Rep. No. 95-595, at 330; see also *In re Drexel Burnham Lambert Grp., Inc.*, 133 B.R. 13, 15-21 (Bankr. S.D.N.Y. 1991) (summarizing history and focus on "rates"). Rate parity was the main focus in 1978; certainly, nothing in § 330(a)'s text indicated Congress had in mind fees-on-fees or other so-called "dilution" that would result from a lawyer's defense of a fee request.

b. More importantly, from the early 1990s until today, Congress and the Trustee have made clear that preventing *overpayment* of bankruptcy professionals is a critical concern.

According to Senator Metzenbaum—author of the 1994 amendments that overhauled § 330(a) to essentially what it is today—"[t]he increased number of bankruptcies...created literally a feeding frenzy for the...professionals who service[d] the unraveling or

the restructuring of a bankrupt debtor." 138 Cong. Rec. S8340-02 (1992). He recognized:

> While the professional fee meters are running full-blast, those responsible for minding the store sit idly by and do nothing.... In many instances, the bankruptcy courts operate more like private clubs for professionals who share the same goal of getting their piece of the action, rather than as the guardian of the bankrupt company and other affected parties. All too often the name of the game is "If you scratch my back, I'll scratch your back."

Ibid. Such concerns motivated Congress in 1994. 140 Cong. Rec. S14597-02 (1994); accord *Lamie*, 540 U.S. at 540 (1994 amendment "designed to curtail abuses in fee awards, according to statements by the amendment's sponsor"). Congress added § 330(a)(4) to *limit* compensation and created a new provision (§ 330(a)(3)) that kept comparability as just one factor. 11 U.S.C. § 330(a) (1994). Petitioners' exclusively pro-fees view thus acts like it is 1978.

Continuing concerns about uncontrolled professional fees have also animated subsequent regulatory efforts. According to the Trustee's Director, "few professionals and, sadly, few courts have shown the inclination to exercise meaningful restraint on professional compensation." White & Theus, *Professional Fees Under The Bankruptcy Code*, 29-JAN Am. Bankr. Inst. J. 22, 80 (2011). Also according to the Director, outside bankruptcy, "private industry has imposed major cost controls on outside counsel," including discounts, "[b]ut in bankruptcy...charging anything other than the full hourly fee often is con-

sidered unfair by the bankruptcy bar." Notes Before The Nat'l Bankr. Conf., at 4, Nov. 10, 2011, available at http://goo.gl/VZJ20X. The result has been transformation of the "comparable services standard...into a bankruptcy premium standard whereby the bankruptcy professionals are allowed to charge rates above what they charge non-bankruptcy clients." *Ibid.* Thus, "the public and the most sophisticated participants in the bankruptcy process say bankruptcy attorneys' costs are rising too rapidly." DOJ, *Justice Department Issues New Guidelines*, June 11, 2013, available at http://goo.gl/kAI8VH.

The Trustee therefore introduced the Guidelines, partly to ensure bankruptcy professionals are subject to non-bankruptcy "market forces." 78 Fed. Reg. at 36,249. It tried to stop "bankruptcy attorneys' costs [that are] rising too rapidly" and to avoid "premium," not "market," rates for bankruptcy attorneys. DOJ, *Justice Department Issues New Guidelines*, *supra*. Indeed, market "comparability" often justifies *restricting* fees. 78 Fed. Reg. at 36,250, 36,265-69.

The high-cost reality of the bankruptcy system was confirmed recently by the American Bankruptcy Institute ("ABI"). See ABI Comm'n to Study the Reform of Ch. 11, Final Report and Recs., Dec. 8, 2014, available at http://goo.gl/Xd76Lo. It noted "[a] common critique of chapter 11 is that it is too expensive," and the "administrative outlay for professionals' fees is often the focal point of debates concerning the costs of chapter 11." *Id.* at 56. It proposed widespread changes to the Code because bankruptcy "is no longer capable of," *inter alia*, "helping to rehabilitate viable companies," in part because the expense of reorganization is so great that companies avoid

bankruptcy altogether. *Id.* at 12, 56. Given all this, the clamoring for *more* professional fees rings hollow.

Petitioners and *amici* assert that bankruptcy courts have discretion to cabin excessive or unreasonable fee requests. But one of the largest studies of fees in bankruptcy cases concluded that objections were mostly ineffective in curbing compensation, in part because 99% of fees and expenses were ultimately approved. LoPucki & Doherty, Professional Fees in Corporate Bankruptcies—Data, Analysis, and Evaluation xxi-xxii, 4-5, 146-47, 157, 215, 259 (2011). Indeed, in this case, the bankruptcy court approved *100%* of petitioners' request for $120 million in core fees. Because petitioners were paid dollar-for-dollar at their standard hourly rates, they have not suffered *any* "dilution" under Congress's view of that concept.

4. Disallowing fees for fee litigation risks no flight of attorneys from bankruptcy.

Petitioners and *amici* threaten the Fifth Circuit's rule would lead to an exodus of lawyers from bankruptcy, but that warning cannot be taken seriously.

First, if fees-on-fees were a critical consideration in choosing a practice area—a dubious proposition—it would be irrational for bankruptcy lawyers to rush to non-bankruptcy work where they *also* cannot obtain fees-on-fees. That is particularly true because bankruptcy practice is a premium practice. In a study of Chapter 11 cases from 1998 to 2007, for example, the total professional fees and expenses for a given case increased about 9.5% per year—nearly four times the rate of inflation. LoPucki, *supra*, at xx. Because "[n]o similar increase has been reported for non-bankruptcy professionals," the seeming re-

sult is "bankruptcy lawyers are paid considerably more than non-bankruptcy lawyers."[22] *Id.* at 147.

Second, no evidence has been offered to support the warnings. Petitioners say a flight "would surely" happen, Pet.Br.50, and their *amici* also offer guesses—that it "may" happen (NACBA Br. 14; NABT Br. 16) or "presents a threat" of happening (NACTT Br. 15). But they present no *evidence* to indicate lawyers have fled the bankruptcy system in districts that have clearly disallowed fees-on-fees.

Third, this case is an especially poor vehicle for petitioners to make their warnings. Any law firm in the country would like to be "undercompensated" the way petitioners were compensated here. Pet.Br.50. Petitioners received over $120 million in core fees for their bankruptcy work, at full rates set and raised by them. It is laughable for them to suggest they would have refused that $120 million engagement if they knew they had to spend time defending it. Indeed, during this same period, petitioners were forced to discount rates *42% of the time* for non-bankruptcy work. Pet.App.91a-92a. The dire warnings about a flight of professionals from bankruptcy work do not withstand scrutiny.

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[22] Petitioners and several *amici* contend the Fifth Circuit's rule would have a more profound impact on smaller consumer cases under Chapters 7 and 13. *E.g.*, Pet.Br.49-50. These arguments again forget that the same American Rule applies to smaller, lower-fee cases outside bankruptcy. They also ignore the growing number of districts with "no look" fees for routine Chapter 7 and 13 cases; "fees at or below a defined threshold may be deemed 'reasonable' without further review" and without filing a fee application. 3 Collier ¶ 330.03[2].

B. The Fifth Circuit's rule gives all parties the proper incentives.

Unsurprisingly, petitioners and *amici* focus only on policy arguments that purportedly cut in favor of higher fees. But the Fifth Circuit's rule promotes the efficiency of the bankruptcy system by giving *all* parties the right incentives going forward.

For one thing, *allowing* fees-on-fees would disincentivize good-faith objections to fee requests. Cf. *Cooter & Gell*, 496 U.S. at 408. For example, if the trustee believes there are plausible but not overwhelming grounds to challenge a fee request, she may simply err on the side of caution if fees will continue to run during the fee dispute. Indeed, objections are currently infrequent, and the specter of incurring fees-on-fees is one explanation. See *McGuirl* v. *White*, 86 F.3d 1232, 1236 (D.C. Cir. 1996). Chilling potentially valid objections to fees undoubtedly harms the bankruptcy system and undermines the attempts to rein in increasing bankruptcy costs.

The Fifth Circuit's rule also protects the interests of creditors and debtors. This full-pay case is "unusual"; in most cases, unsecured creditors and emerging debtors would bear the burden of fees-on-fees. Pet.App.16a-17a; US.Br.30. Petitioners complain about fee dilution, but dilution of recoveries to creditors *caused by* fees-on-fees is more problematic, contravening "the central purpose of a bankruptcy case...to maximize the distribution of assets...to unsecured creditors." *In re Duratech Indus., Inc.*, 241 B.R. 291, 296 (Bankr. E.D.N.Y.), aff'd, 241 B.R. 283 (E.D.N.Y. 1999).

Denying fees-on-fees also provides the right incentives for attorneys. If attorneys know they have

to bear their fees during a fee dispute, they will have strong incentives to ensure that their fees are reasonable and that their fee applications are correct from the start. Pet.App.17a. Petitioners claim fee applicants will face an incentive to accede to all objections, Pet.Br.52, but they will be under no more pressure to do so than non-bankruptcy lawyers whose clients object to bills.

If anything, *allowing* fees-on-fees would create a perverse incentive for fee applicants to drive up the cost of litigation. Here, for example, petitioners sought $8 million for five months of fee litigation, including over $400,000 to "self-audit" their bills (even though their applications and task descriptions should have been correct initially), and $750,000 to produce ASARCO's files. And petitioners apparently believe the meter is *still* running, even in the proceedings before this Court. See Pet.Br.14 n.5. Fee litigation should be a last resort, not a profit center for firms that perform bankruptcy work.

Finally, in a battle over policy interests and getting the incentives right, it bears emphasis that the default rule in our legal system is the American Rule. While a coherent policy argument for a loser-pays system certainly exists, the contrary argument has almost always held sway in this country.

* * *

The vast majority of petitioners' *amici*, like petitioners, are professionals who stand to gain financially from a ruling allowing fees-on-fees. It is unsurprising that lawyers in Beverly Hills (among the *amicus* bankruptcy bar sections) and professionals everywhere want more money and abhor dilution. But Congress had a broader view. Congress rightful-

ly considered all the stakeholders in enacting § 330(a) and providing reasonable compensation for a wide variety of professionals who render necessary services for the estate. Congress clearly did not view litigation over professional fees to be the rare category of litigation that merited fee-shifting. The Fifth Circuit reached precisely the correct result in honoring the balance struck by Congress.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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January 20, 2015

APPENDIX

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11 U.S.C. § 327(a) provides:

> Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C. § 328(a) provides:

> The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

11 U.S.C. § 328(c) provides:

> Except as provided in section 327(c), 327(e), or 1107(b) of this title, the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section

327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

11 U.S.C. § 330(a) provides:

(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103—

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

(3) In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

(4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for—

(i) unnecessary duplication of services; or

(ii) services that were not—

(I) reasonably likely to benefit the debtor's estate; or

(II) necessary to the administration of the case.

(B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity

of such services to the debtor and the other factors set forth in this section.

(5) The court shall reduce the amount of compensation awarded under this section by the amount of any interim compensation awarded under section 331, and, if the amount of such interim compensation exceeds the amount of compensation awarded under this section, may order the return of the excess to the estate.

(6) Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.

(7) In determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission, based on section 326.